REMARKS

UPON THE

LAW OF BAILMENT.

BY

JOHN B. WALLACE.

[ORIGINALLY PUBLISHED IN THE AMERICAN JURIST.]

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ADVERTISEMENT.

THE "REMARKS UPON THE LAW OF BAILMENT" contained in this pamphlet, were written by the late J. B. Wallace, a short time before his death, in January, 1837, and have appeared since, in the American Jurist, published at Boston. They were intended to draw the attention of the profession, to some principles in the Law of Bailment, which he regarded as important, and which he thought had been either overlooked, or else, not sufficiently attended to, by the writers upon that subject.

Mr. Justice Story, in a note to the second edition, lately published, of his work on Bailments, refers to Mr. Wallace's remarks in the Jurist, and comments at some length upon them; but as he states, that it was not within his design to answer those remarks, and, as on that account, perhaps, the argument of Mr. Wallace is imperfectly presented in the note alluded to, the article retains whatever of interest it had originally, and it is now printed in a detached form.

It will be seen at the end of the Remarks, that it was the purpose of their author to continue the subject in ano-

ther number. His death prevented the fulfilment of that intention.

It may, perhaps, be as well to add, that the Remarks now reprinted, referred to the first edition of Judge Story's work, with which the second does not, on all points, entirely coincide. The second treats more at length than the first did, the principles which are controverted by Mr. Wallace, and, in a general way, vindicates them. There are also variations on some minor points, between the two editions; but either of them can be referred to, for the general principles which are in question.

JOHN W. WALLACE.

Philadelphia, March 30, 1840.

REMARKS

UPON

THE LAW OF BAILMENT.

BAILMENT is an important branch of the law, and is daily becoming more so in consequence of the increase of our internal trade. It is desirable, therefore, that the law respecting it should be settled. For this purpose its foundations must be fixed on true principles—principles consistent with those which obtain in other departments of the law. In any department of the law, if in sustaining a position it be necessary to introduce a new principle unknown to any other branch, or to overturn an old one pervading all others, it may safely be asserted that, either the position is false, or the foundation on which it is attempted to rest it, not the true one. Established principles of the Common Law are in more danger of being disturbed in this subject of bailment, than in perhaps any other. Derived to us principally from the civil law, our jurists, in their investigations of it, naturally resort to that system. The results there found being confessedly equitable and just, writers transfer those results to our system, and they are found to harmonize with it as well as with the civil law. When an inquiry is made into the principles on which they rest, recourse is naturally had to the same source from which the results were drawn; and when any principle thence deduced is found to be at variance with a principle of the common law pervading its other branches, the most ready

solution of the difficulty is to suppose that the common law principle does not belong to, or must yield in, this department. A more extended view of the common law would show that the same just results are reached by it; but that in it they sometimes are deductions from a distinct class of principles; and that principles established in other branches of the law remain so in this whenever they happen to affect it.

The subject of bailment being in a high degree important, various, in some degree unsettled, and affording scope for learning and thought, it is a matter of some surprise that so few attempts have been made to systematize and digest it in a regular treatise. In England, to this day, the only one is that of Sir William Jones. The high character of its author for extensive research and acquirements in classical and oriental literature, gave to his book a higher reputation than, as a commentary on a common law subject, it deserved. It has always been cited with respect in Westminster Hall, and quoted as authority by writers on the subject. One of its editors, a barrister of Lincoln's-Inn, declares "that the learning of Lord Coke could not have supplied sounder law," and Chief Justice Parker, of Massachusetts, characterizes the "ESSAY" as "a profound and brilliant treatise, in which, with a wonderful mixture of learned research and classical illustration, the author has analyzed the complicated contract of bailment, and applied the principles of moral philosophy, the doctrines of the civil law, and the usages of all nations, ancient and modern, to this diversified subject, so as to leave little room for speculation except as to the application of his rules to particular cases as they arise."* As an explication of the principles of moral philosophy, the doctrines of the civil law, and the usages of nations, the eulogy may be just; but as an Essay on a branch of common law, and a system of common law "rules," it cannot be so highly praised. Chancellor Kent gives a more correct character of the

* Foster v. Essex Bank, 17 Mass. 449.

work in his opinion delivered in *Thorn* v. *Deas*,* in which, after showing conclusively the inaccuracy of a favourite doctrine of Sir William's, he says, "The doctrine on this subject in the Essay on Bailments is true in reference to the civil law, but is totally unfounded in reference to the English law; and to those who have attentively examined the head of Mandates, I hazard nothing in asserting that that part of the work is loosely written; it does not discriminate well between the cases; it is not very profound in research, and is destitute of true legal precision." What the Chancellor says of that part of the Essay, which treats of Mandates, might have been extended, in a degree at least, to other parts of it. In the United States, the subject has been more fully and more carefully examined. Chancellor *Kent*, in his COMMENTARIES, has given a digest of this branch of the law, better methodized, much plainer, and much more correct than the more extended Essay of Sir William Jones; and Mr. Justice *Story*, as Dane professor of law in Harvard University, has given a full explication of the subject; evincing at least the research and learning of the distinguished oriental scholar, and much more acquaintance with, and regard for, the common law. The author of the ESSAY, better versed in the Roman than in the English law, appears to prefer the principles of the former to those of the latter where they are not identical. And our distinguished writers above mentioned, whose familiar acquaintance with the civil law caused them to know its excellence and to reverence its equity, and whose refined taste and classical erudition enamoured them of its writers, have been led farther than they probably were aware of, into a recognition if not adoption of some of its principles variant from those of the common law. Correcting many of the errors of Sir William Jones, they have in some cases admitted principles and positions from which arise difficulties which they did not perceive, or have not sufficiently explained. Dealing with a civil law subject

* 4 Johns. Rep. 100.

and with the authorities of civilians, their minds seem to have been drawn off from sufficiently considering the *forms of actions* applicable to the different cases arising under the law of bailment, and the different allegations which the deductions in those cases must set forth. And yet no one will more readily acknowledge the truth of the maxim laid down by Chief Justice Gibson,* that "the *forms* of the law are the indices and conservatories of its principles;" and we all know that pleading is the *test* of the law; and that a false principle is frequently exposed by the inability to set forth under it cases in the manner which good pleading requires; and that after escaping every other scrutiny, it is detected by that of a demurrer.

The following detached remarks are intended to draw the attention of the profession to the consideration of some of the principles and positions of different writers on this subject.

I. Definition of Bailment.

Sir *William Jones* defines bailment to be "a delivery of goods in trust, on a *contract* expressed or implied, that the trust shall be duly executed, and *the goods redelivered*, as soon as the time or use for which they were bailed shall have elapsed or be performed."† *Blackstone* calls it "a delivery of goods in trust upon a *contract* expressed or implied that the trust shall be *faithfully* executed on the part of the bailee."‡ Chancellor *Kent* defines it "a delivery of goods in trust upon a *contract* express or implied, that the trust shall be duly executed and *the goods restored* by the bailee as soon as the purposes of the bailment shall be answered."§ Mr. Justice *Story* considers neither of these definitions to be strictly correct, and gives his own thus: "A delivery of a thing in trust for some special object or purpose, and upon a *contract* expressed or implied, to conform to the object or purpose of the trust."‖ If these re-

* Fritz v. Thomas, 1 Whart. Rep. 71.
† Jones on Bailm. 117.
‡ 2 Kent's Com. 558.
§ 2 Black. Com. 452.
‖ Story on Bailm. § 2.

marks shall be extended to a full examination of all the parts of these definitions, it will probably be found that the last, being the least minute, is the most correct. My present object, however, is to show that in a point involving an important principle, namely, that by which it is called a *contract*, they are all incorrect. I do not mean to say that in no case is bailment a contract; but that in some of its most important divisions, it is not. I am aware how difficult, nay, how impossible in some cases, owing to the imperfection of language, it is to give a perfect definition of law terms; and if they who use the word "contract" in their definitions, had shown in their dissertations that they do not mean to use it in its strict technical sense, it would be but a hypercritical logomachy to say much about it. But by all the above writers, and by none more explicitly than by Mr. Justice Story, has its correctness on this point been assumed; and all the relations between the bailor and bailee, in all the species of bailment, rested on *contract*. Nay more, the term is used by courts and judges generally when speaking of bailment, without distinction of its several species. And yet it will not be difficult to show that in some of the species, *contract* does not subsist; and that the rights of the bailor, and his remedy for a violation of them, have been rested on a wrong ground. Unless this can be shown, an anomaly exists in this branch of the law; an important principle is here disregarded, the effect of which cannot but be mischievously felt in other branches; and well established distinctions in the forms of actions, and the foundations of legal liabilities overturned. The adoption of this principle extends the responsibility of certain bailees beyond the just limit, and in this respect substitutes the civil for the common law. Mr. Justice Story has gone more fully than any other writer into an examination of the reasons on which this assumption has been made, and has exhibited those reasons in the strongest light of which they were capable. His courtesy will therefore excuse me when in combating the positions and prin-

ciples to which I object, I do, for the purpose of being well understood, generally quote the text of his Commentaries.

A CONTRACT, at the common law, is "an agreement *upon sufficient consideration*, to do or not to do a particular thing."* A consideration is of the *essence* of a contract; without it, none can subsist, nor can any action be sustained for an alleged violation of one. It is a maxim, *Ex nudo pacto non oritur actio;* and whatever it may mean in the civil law, a nude pact means in our law, one without a consideration. Now in two species of bailment, no consideration is paid to the bailee for the obligation he assumes. It is an essential property of them, that none should be paid. They are required to be gratuitous, or they change their character and become of another species. A DEPOSIT is "a naked bailment of goods to be kept for the bailor, without recompense," &c. *Story*, § 4, again, "§ 7, the custody must be gratuitous." A MANDATE is "a bailment of goods *without reward* to be carried from place to place," &c. *Story*, § 5. "Mandate is when one undertakes, *without recompense*, to do some act for another in respect to the thing bailed." 2 *Kent's Com.* 568, adopted by *Story*, § 137. Again, in § 153, Mr. Justice *Story* says, "Secondly, the contract must be gratuitous; and this is of the very essence of the contract; for if any consideration is to be paid, it passes into another contract, that is to say, the contract of hire. *Mandatum nisi gratuitum, nullum est.*" Here then in the two species of *Deposit* and *Mandate*, the bailment is for the ease, benefit, or convenience of the bailor, without any benefit to the bailee, and without any recompense or consideration. Does any contract arise? The above writers hold that there does. If so, it is confessedly without consideration. It is a *nude pact*. There is neither damage or loss to the bailor, nor benefit to the bailee. The benefit in both cases is to the bailor; the burden or inconvenience on the bailee. If there be a contract,

* 2 Black. Com. 446.

it is the only instance in the law in which a contract can be raised or subsist without a consideration. Is this then an exception to the otherwise universal rule requiring a consideration? None of the books, when stating the principle, state any exception; and this so frequently occurring, ought to have been stated, if it be an exception. Without attempting to establish the doctrine by citing every treatise, commentary, digest, and book of reports which treats of contracts, I may simply refer to the great case of *Hughes' exor.* v. *Hughes' admr.* reported in a note in 7 T. R. 350; and to this case simply because being in the House of Lords it is of controlling authority, and because the opinion delivered was given as the unanimous opinion of all the judges. The principle requiring a consideration to make a binding contract was recognised in its fullest extent without any exception. The case itself was a strong one. The debt claimed by the plaintiff was a just and acknowledged debt; the defendant owed it, and was bound to pay it as administratrix; she had promised, in her personal character, to pay it; but for her assuming this new responsibility there was no consideration; and, therefore, though it was after verdict, the promise was held not binding. The case is the stronger by showing how astute the law is, and how far it will go, to support a just claim: for it is declared that if the promise upon which the suit was brought had been one which the law required to be in writing in order to be binding, the court would, after verdict, have inferred that it was in writing, though not so laid in the declaration, nor so proved. But with respect to a consideration, so essential, so really requisite is *it*, that it cannot be inferred even after verdict, but must be set out in the declaration, and must of course be proved. I feel as if an apology were due for urging arguments and citing authorities to prove what, in the language of a learned judge, may be called horn-book law; for that every contract must have a consideration seems to be such. But when distinguished lawyers are establishing important legal relations,

and resting extensive legal liabilities upon the ground of *gratuitous contract*, it seems proper to resort to even first principles to show that such contracts cannot subsist.

I infer from what has been above stated, that neither in the case of *Deposit* nor in that of *Mandate*, is any contract formed. But pursuing the subject farther, what is the contract which is supposed to be formed. First, in regard to *Mandates*.

MANDATE. I deliver a bale of goods to A to carry gratuitously for me from *Philadelphia* to *New York*, and he promises to carry it. What is the contract on his part, if there be one, and what the obligation on him by virtue of it? Common sense would say, it is that he should do what he promised to do, namely, carry the bale. But there is not one of the writers on Bailment (except Sir Wm. Jones, whose opinion is now universally admitted to be wrong,) who alleges that that contract is formed between us, or that that obligation rests on A, the bailee. They admit, what is too well settled to be disputed, that that agreement is void for want of a consideration: in other words, that in legal estimation there is no such contract; that A is not bound to take a single step in the matter; and that no action lies against him for entirely omitting it, though I, relying on his promise, am prevented thereby from having it carried by another, and suffer great loss from the omission. *See Story on Bailm.* §§ 164 to 169 inc. If then there be no contract on the part of the mandatory to do that which he promised to do, what is the contract that is raised on his promise? The allegation is, that though there is no contract to stir in the matter at all, yet if the mandatory does attempt to perform his engagement; if he enter upon the execution of the trust, his promise then becomes a contract to do it with due care, or rather that he will not do it with such gross negligence, as to injure the thing bailed, and thus damnify the bailor. See *Kent's Com. Sec.* 40. *div. II. of Mandatum. Story on Bail*, § 164, *et seq.* It is true the above cited authors do

not say in terms, that such is the *contract;* but they do say that such is the obligation on the mandatory, and they do rest that obligation on the ground of contract. See particularly *Story*, § 170. The contract, then, is not for the doing of the thing, but only as to the *manner* of doing it. It might be a sufficient answer to this to ask why, if the contract to do the thing, be void for want of a consideration, the contract, as to the manner of doing it, is not equally void for the same reason. But farther, from words importing an engagement to do a thing, without a syllable as to the manner of doing it, can you, at the same time that you say no legal contract is formed to do any thing, extract or deduce a contract as to the manner of doing it? The manner of doing a thing is but an accident or circumstance relating to the subject; and though the accident may subsist in thought without the subject, it is difficult to conceive by what legal legerdemain the one can be so metamorphosed into the other, as that terms applying only to the former, shall be found practically to mean the latter. It is alleged that the law makes a difference between nonfeasance and misfeasance; and the reasoning seems to be that though in terms the engagement is for feasance, but having no consideration it is void as a contract for feasance, yet it is good as a contract against misfeasance, though equally without consideration in that point of view. How it becomes so, it is very difficult to perceive. Mr. Justice Story is fully aware of the inconsistency and of the difficulty it introduces. He points out the distinction between nonfeasance and misfeasance in a mandatory; refutes the position of Sir *William Jones*, that an action lay for nonfeasance, but seems dissatisfied that the law is so; asserts that "there is an artificial refinement in the distinction between nonfeasance and misfeasance which seems to be a little unphilosophical, and not quite agreeable to the dictates of common sense," § 167, and thinks that "perhaps it would have been better, if the distinction alluded to had never been recognised; and the broad principle of the

Roman code, to give a remedy in cases of special damage, had been universally proclaimed."

It is with deference, but with confidence, that I dissent from the learned Professor. The distinction between nonfeasance and misfeasance, as will be presently seen, is founded in good sense and perfect justice; and it is only because the writer has rested it on a wrong foundation that the difficulty and apparent inconsistency exists. "The broad principle of the Roman code" could not be adopted into the common law without breaking down a principle in that law of universal application, without which, in the opinion of the distinguished jurist himself, "judicial tribunals would be overwhelmed with litigation, or become scenes of the sharpest conflict upon questions of casuistry and conscience." § 169. Such an effect ought not to be induced without great necessity, and for the essential purposes of justice; and we may reasonably question the correctness of a theory, which, to preserve its consistency, requires such a sacrifice. If the common law authorities on the subject be fully examined; if we consider the *nature* of the action and the *form* of the action brought for an injury to the thing bailed, the difficulty is at once removed. It is seen, to be sure, that in pursuance of a most useful practical principle, no action lies against the mandatory for nonfeasance, (there being in legal contemplation, no contract to *do;*) and it is farther seen, that if the mandatory does undertake or begin the execution of his trust, and does it so negligently as to injure the thing bailed, an action does lie against him for this misfeasance. But this right of action is not by virtue of his contract, for no contract exists after he begins to *do*, more than before. It rests on the broad principles of general justice. It is founded on the *tort;* it arises, not *ex contractu*, nor even *quasi ex contractu*, but *ex delicto*. It would lie equally, if the injury were done to the thing bailed, while in the hands of the mandatory, even before he begins to execute the trust; though generally this cannot practically be, as

the injury usually occurs in the execution. This simple explanation removes all difficulty. Though the engagement to carry, as it is without consideration, forms no contract; still the bailee has no right to injure my property. He is carrying the thing with my consent, though not under any contract. But my consent to carry, does not authorize him to commit a wrong; and, if he do commit one, he is liable to an action on the case, not on his *assumpsit*, but for the *tort*. The form of the action is not *assumpsit*, but *case;** the plea is not *non assumpsit*, but *not guilty*. In this view of the matter there is no inconsistency; no principle is violated; every thing is congruous. The bailor's want of right to sue for nonfeasance, is entirely consistent with his right to sue for misfeasance. *Assumpsit* cannot be for misfeasance as such. If you sue for misfeasance, your action is grounded on *tort*, not on contract. It arises *ex delicto*, not *ex contractu*. If there be a binding contract *to do*, and misfeasance in the execution of it, you may, generally speaking, bring *assumpsit;* but then the *gist* of your action is the non-performance of the contract; and you must take care to declare on the non-performance, and use the misfeasance as evidence of it; for if there be misfeasance, the contract is not performed as it was agreed to be, and of course *assumpsit* lies for the breach. You may, if you prefer, make the misfeasance the ground of your action; but then you waive the contract; your action is *ex delicto;* it is founded in *tort;* and it is the same thing, as if there had been no contract, except so far as it may be used as matter of inducement, or to swell the damages. The authorities, from the earliest day, as well as the reason of the thing, support the distinction I have taken. Let the question be distinctly understood. It is whether, even after the mandatory enters upon the execution of his trust, or the performance of his promise, there be any *con-*

* *Assumpsit* is technically an action on the case; but I use the terms in the restricted sense in which they are now generally used: *Assumpsit* as arising *ex contractu;* Case, *ex delicto*.

tract; in other words, whether his responsibility for doing it amiss, be on the ground of his promise. If it be, then an action of *assumpsit* lies against him. And if an action of *assumpsit* will not lie against him, then there is no binding promise, no contract: for *assumpsit* will lie on the violation of every binding promise not under seal.

Some readers may suppose that this is a mere question about words, or the mode of pleading. Not so. It involves important principles, and decides the extent of responsibilities in many cases. For instance:—Suppose a mandatory promise me to carry a bale of goods worth $100 from Philadelphia to New York, and on failure, to pay me $500, as liquidated damages for non-performance; and he carry it so grossly negligently as that the goods are destroyed or lost. If by entering on the trust, the promise has become binding on him, and he is liable on the ground of contract, I am entitled to bring an action, founded on his promise, and recover the $500. If, on the other hand, my right of action is founded simply on the injury he has done my property—on the *tort*—then I recover the amount of damage my property has sustained, namely, $100. In the former case, my action may be debt or assumpsit; in the latter must be case. A still more important result from the difference is this. If there be a contract, and my right of recovery is founded on contract, I may, after the death of the bailee, sue his executors, or continue against them a suit originally brought against him. If my right of action be founded on *tort*, I can do neither; *moritur cum persona.* If I deliver a casket of jewels of great value to another, and he promise to carry them gratuitously to New York, and in the carrying he most negligently suffer them to fall into the water, or purposely throw them overboard, and they be lost; if by beginning to carry them the bailee has brought himself under a contract, his executors may be sued after his death; if no contract has been formed, and he is liable only for the *tort*, his liability and that of his estate ceases with his life, be his estate ever so large. Our

sense of justice would, at first, incline us to say his estate ought to be liable; and to make it so our feelings would incline to make it a contract. But if the casket had been delivered to the bailee at the wharf, and before beginning to carry it, he had with the same negligence dropt it, or with the same wickedness thrown it into the river, by the admission of all he is liable only as for *tort*, and his estate is not liable after his death. It would require more perspicuity than I possess, to see any reason, either in morals or law, why the liability of the bailee should be more enduring in the former case than in the latter.

Again, if a mandate be committed to two jointly, and in the execution of it, one commit a misfeasance, if his liability be on the ground of contract, both must be sued, and the recovery must be against both, or neither. If on *tort*, he who commits it is liable; but you may sue both, and recover against both or one, as your evidence shows both or one to be guilty. There are other results arising from the distinction; some of which will probably be noticed hereafter. The degree of diligence which a mandatory or depositary, is bound to observe, will, in many cases, be dependent upon it.

I have stated the opinion I oppose in the manner most favourable for those who hold it. But it seems to me that they go farther, and maintain that though the mandatory is not bound by his contract, if he choose to consider it a nullity and do nothing in it; yet if he does choose to consider it obligatory on him, and evinces that choice, and confirms that obligation by beginning to execute it, it then becomes obligatory on him *in toto;* or at least so far that if special damage occur to the bailor from its being done amiss, he is liable on his contract, although the damage arise not from injury to the thing bailed, or the thing be not injured at all. See Story on Bailm. §§ 170, 172, 166, &c.—2 *Kent's Com. Lect.* 50.—*Thorn v. Deas*, 4 *Johns. Rep.* 96 to 99 inclusive. It may be that I misunderstand the learned writers; and if I do, I beg leave to apologize in

anticipation, and will do so again after the conviction of my error. But unless I understand them incorrectly, I perceive no pertinency in their reasoning upon the subject; nor in their making it peculiar to the law of mandates; nor in the acute and ingenious reasoning to show the difference between the liability of a mandatory for nonfeasance and misfeasance; nor for their opposing the opinion and reasoning of Sir *William Jones* in asserting the liability for the former, and agreeing with him in regard to the latter, when he places the liability in both on the ground of promise or contract. If they mean only that if a man who is a mandatory commits a *tort* against the property in his hands, he is liable to answer for it in an appropriate action, I have only to agree with them, and say that so is every other man, be he a mandatory or not; but that his liability is not in consequence of his character as mandatory, nor of his promise as such; but by virtue of the broad and eternal principles of justice, which makes every man liable for the injury he does his neighbour's property. In other words, he is responsible *ex delicto*, not *ex contractu*.

But I do not perceive that I have, or can have misunderstood the position which those writers maintain. If I have not, I deny its correctness, and say not only is it contrary to established principles, but that no adjudged case can be found to support it, though some crude *dicta* may be cited which countenance it. It appears to me that the point may be at once decided by asking an answer to a precise question, the answer to which does decide it. Has *Assumpsit* ever been sustained for misfeasance; misfeasance as the *gist* of the action? Can it be sustained? The affirmative will hardly be asserted. But will not *assumpsit* lie for a breach of every parole contract? And is not misfeasance in the execution of a contract a breach of it? The confusion has arisen from not considering misfeasance as an independent ground of action, distinct and different from breach of contract. If any man, mandatory or

other, commit a *tort* against my person or property, by which I sustain an injury, I have an action against him for the *wrong*. If I have a binding contract with him, by which he is to do something for me, or touching my property, and in executing it he so does it amiss as to commit a *tort*, I may waive the *tort*, and bring *assumpsit* for the non-performance of the contract; or I may waive the contract as a ground of action, and sue for the *tort;* and in some cases, I presume, I may sue both for the breach of contract and the *tort*. If the engagement be gratuitous, and he begin to execute it, and do it *amiss*, yet without committing a *tort*, (and it may certainly so be done,) he is not liable to a suit at all.

The following cases will show the difference between the positions which I oppose, and which I maintain. Suppose I deliver a bale of goods to A to be carried gratuitously from Philadelphia to New York, and he promises to carry it accordingly. Instead of carrying it he puts it carefully into his warehouse, and there it remains, ready to be delivered to me when I demand it; but I, supposing it to be in New York, sell it there and agree to deliver it by a certain day, by the non-doing of which, I lose the sale and sustain damage. It is admitted on the other side, that this is no more than nonfeasance, and that no action lies although I have sustained special damage. But suppose he puts the bale on board the steamboat, and carries it on the way towards New York as far as Bordentown; and by the return of the boat in the afternoon, brings it back without injuring it, and puts it safely in his warehouse, where it remains ready for me as before; and I sell it as above stated, and am damaged. Here he has begun to execute the mandate, and he has certainly done it amiss. Has he rendered himself liable for the damage I have sustained, or otherwise soever? If I understand the argument on the other side, he has: I contend he has not. It is to be understood that I do not sustain any damage from the mere act of his carrying the bale to Bordentown; for

under certain circumstances, that might be a cause of action itself; the damage arises from my not having it at New York, where he promised to deliver it. Now if he is liable, he becomes so in consequence of his beginning to do it. How can the declaration be framed? An action founded on promise, and no consideration laid! but in lieu thereof you state that the bailee made the promise and began to execute it, but did not complete it—and this supplies the want of a consideration! If in carrying my bale to Bordentown, he had *injured* it, unquestionably I can sue him for that injury, whether he afterwards carried it to *New York*, or brought it back to *Philadelphia;* and I can equally do it had he so injured it before he took it out of his warehouse, or began to execute the trust. But in all these cases, the responsibility of the mandatory is for the *injury* or *tort*, not for his breach of promise in not carrying. Every case in which there has been a recovery for misfeasance, will be found to be of this character; and not as giving validity to an otherwise invalid promise. Judges may have sometimes spoken loosely on the subject, and have given rise to confused ideas; but no judgment has ever gone on other grounds, nor when the point has been judicially before the judges, have they entertained different views. The impossibility of framing a declaration upon a gratuitous promise, though begun to be executed, for a breach of such promise, shows that no action could be maintained thereupon.

Take still another case: Suppose a man promise to build me a ship out of his own materials, and it is expressly agreed he is to have nothing for it. It is admitted he need not put a hatchet to the keel. But suppose he begins, and leaves off without finishing the ship; or that he continues, but ruins the materials and makes no ship; and relying on his promise and expecting to have the ship, I contracted to carry a cargo, and I can procure no other ship, and the cargo is lost by the delay, and heavy damages recovered against me therefor. If the builder by beginning to build

the ship has made his promise obligatory, and I have a right of action against him founded on contract, I can recover of him the whole amount that I have been compelled to pay in consequence of his default. If my right of action be founded on *tort*, I cannot recover a cent. The materials are his, and no tort is done to my property. Can I or can I not recover? Suppose in the above case the materials were mine, and he ruins them;—if the action be founded on contract, I can recover the damage I suffer from not being able to carry the cargo, which may be immense;—if founded on *tort*, I can recover only the amount of loss I sustain from the pure fact of injuring my materials, which may be a mere trifle. Take a still plainer case: Mr. Justice Story accounts for the difference of the liability of a mandatory for nonfeasance and misfeasance thus, namely, "He has his choice to renounce the contract or to perform it; to treat it as a nullity or as a subsisting obligation. If he chooses to consider it in the latter light, and to act upon it as obligatory, why should he be permitted to separate the parts of the obligation, or to disjoin those, which were entered into as a whole?"—§ 170. Suppose a man promise gratuitously to pay me £100. By the admission of all he is not bound to pay me a cent. But "he chooses to consider it as a subsisting obligation and to act upon it as obligatory," and therefore beginning to perform it he pays me £10 in part performance; and suppose, to make the case stronger, that I am bound to pay money to another, by the omitting to do which, I shall suffer damage; and relying on his promise and his now supposed liability, because he has begun to do it, I omit other means to get the money; and then he refuses to pay the balance, and I suffer actual damage independent of the mere non-receipt of the money,—can I recover from him either the balance of the money, or damages for the injury I sustained? Upon the controverted principle I undoubtedly may; but what lawyer will assert it? This case is not that of a mandate; but the principle is the same; and it is

not confined by the writers I have quoted to mandates. The year-book cases are not mandates, nor are those of agencies to effect insurance, or of surgeons to cure maladies, cited by those writers; but the principle is the same.

It may be satisfactory to the reader to review the principal cases which have been cited to maintain the distinction between nonfeasance and misfeasance. They begin with the early year-books and come down to modern times. It may be well enough to remark that the points decided by the year-books are authority and have become the foundation of our law. But the conjectures thrown out by the Judges, or the suggestions made by them in conversation with the counsel, or with each other, are of no greater value than their intrinsic worth gives them; they are not authority.

The year-book cases are reviewed by C. J. *Kent* in *Thorne* v. *Deas;* but, I think, with not as much precision as he usually exercises. The first case is *Walton* v. *Brinth,* 2 *Hen.* IV. 3, cited by C. J. *Kent,* 4 *Johns. Rep.* 97. That case, as I understand it, was nothing more than a question as to the form of action. The point decided was, that *Assumpsit* upon a promise would not lie. At that early day that form of action was not known. The only remedies for breach of promise were covenant or debt. *See Reeves' Hist. Eng. Law, ch.* 18. But if the promise were by parole, covenant would not lie; and if the damages were unliquidated or the amount uncertain, debt would not lie; and in such cases the plaintiff was without remedy at law. This was an attempt to give him one. It was an action on the case on the *promise;* that is to say, *assumpsit;* but the court would not as yet sustain it. C. J. *Kent,* citing it as above stated, seems to consider the question of a consideration as involved in it; and that "the Court at once took the distinction between nonfeasance and misfeasance," as affecting that question. But I do not perceive the question of the necessity of a consideration to be even hinted at; and though the distinction between nonfeasance

and misfeasance was, it was so, not by the Court but by one of the Judges, *Brynkley*, and that hesitatingly, (his expression is, "*peradventure* if the plaintiff had counted," &c.) and it was so hinted at, not as affecting the question of a consideration, but of the form of action; for if the plaintiff had so counted, *peradventure* the action for the *tort* would have lain. *Hankford*, another of the Judges, says, "the plaintiff might have a writ on the statute of labourers;" which shows that there was a consideration in the case, otherwise such an action would not lie. *Rikhill*, who delivers the judgment of the Court, says nothing about these matters; but merely gives judgment against the plaintiff, because he had counted on a covenant and did not produce a specialty to sustain it. The writ and declaration were expressly in what would be now termed *assumpsit;* it seems to have been considered a particular kind of action; for the report states, that *Watton port briefe* formé *sur especial matter devers*, *T. B. et le briefe fuit de placito*, &c. *Quare cum idem T.* &c. *assumpsit*, &c. If that form of action had been then maintainable, for aught that appears, this suit would have been sustained.

The next case is 11 *Hen. IV.* 33. This case seems to be the same as the last; and if not the same is very like it. The names of the parties are not given in this; but both suits are against a carpenter, on a promise to build a house by a certain day, and not doing it. Judgment was given against both plaintiffs on precisely the same ground; and the same conversation takes place between the counsel and judges, except that the names are not the same, and some of the expressions are fuller and stronger in this than in the first. *Norton*, counsel for the plaintiff, on an objection being made to the form of action, says, "If he had *done my house badly* and *had spoiled my materials*, I would have an action on my case sufficiently well without a deed." *Thirning*, one of the judges, replies, "I admit it fully in that case, because he should *answer for the tort he had done, quia negligenter fecit;* but when a man makes a

covenant, and will not perform that covenant, how can you have an action against him *without a specialty?*" The question simply was, whether an action on the case could be sustained upon a promise. No question as to the necessity of a consideration arose; and the distinction between nonfeasance and misfeasance was taken to show that for the latter an action for the *tort* would have lain, though no action on the promise would.* These *dicta* therefore, so far as they go, sustain my position.

These decisions were correct. An action on the case is an action of *trespass*, and as then understood, could arise only *ex delicto*, and was founded on *tort*. It required therefore, a stretch of construction or a fiction, to an extent which the courts would not go, to bring non-performance of contracts within its pale. The inconvenience, however, of driving plaintiffs into chancery, on breaches of parole contracts, at length induced the courts to relax, and sustain this action for such breaches; but still keeping as near as possible to the original ground of action as arising *ex delicto*, the breach of the promise was laid as founded in fraud and deceit; and the precedents of declarations in the books of forms are frequently so still. This change, however, was not effected without great difficulty and many doubts, as the cases show. The first cases in which this form of action was countenanced was that of *W. B.* v. *Watkins*, 3 *Hen. VI.* 36, commented on largely, but not accurately understood, by Sir *William Jones*, and his misconception corrected by *Kent* C. J., in *Thorne* v. *Deas*. Mr. Justice *Martin*, whose opinion has been much remarked on, seems only to have adhered to the old law, namely, that *case* could not be brought for a breach of

* The point of Brooke's remark, (*Bro. Act sur le case* 40,) on this case, seems to have been misapprehended. He does not mean to say that the want of consideration was one of the reasons for not sustaining the plaintiff's action. He gives the true reason, that there was no specialty; and he knew that at the time of that decision such an action would not lie. But when he wrote, an *assumpsit* would lie; and he means to say, that notwithstanding this, the case seems still to be law, "*at this day;*" because in *assumpsit* there must be a consideration laid, and in this case none is stated, and therefore the plaintiff could not sustain his action even now.

promise, but only for a *tort*. *Babington* C. J. thought this form of action would lie, but then that there must be a consideration alleged. *Cokain* J. held the same opinion as to the form of the action, and thought it sufficiently alleged by implication that a consideration was to be paid. But no judgment was given, the case not being at issue, as no plea or demurrer was filed; and so the case is of no authority, and of no importance except as showing the leaning of the Judges to support this form of action. There are other cases in the *Year-books*, most of which are cited by *Kent* C. J., in which the distinction is taken between misfeasance and nonfeasance; but in none of them is it taken for the purpose of establishing the position that though a promise without consideration was void if nothing was done;—it became binding if any thing were done and done amiss. The question in all of them was, whether an action on the case on a breach of promise,—an action of *assumpsit*,—could be sustained. Whether the promise were void or not for want of a consideration, was not the *gist* of the inquiry: in some of them it is expressly stated there was a consideration, but still the relevancy of the action was mooted. The action of *Assumpsit* came gradually into use; but was not fully naturalized till *Slade's* case, 4 *Rep.* 92, 7. In the elaborate opinion there delivered, no intimation is given that it could be extended to the case of a gratuitous engagement executed amiss.

In regard to more recent decisions both Mr. Justice *Story* and Chancellor *Kent*, seem to rest upon the cases of *Coggs* v. *Bernard*,* and *Elsee* v. *Gatewarde*.† Let us see what these cases were. The last sustains, in a pointed manner, the positions I contend for. It was founded solely on *tort*. There were two counts. The first was for *nonfeasance*, but so framed as to make it, if any thing, a *tort*. The second alleged the defendant to have entered upon the work, but to have done it amiss. Here then the position I oppose, came directly in operation: if sound, the de-

* *Lord Raym.* 909. † 5 T. R. 143.

fendant's engagement had become obligatory on him, and he ought to have been sued for the breach of it; the action should have been *assumpsit.* But Lord *Kenyon* C. J., says, "If this had been an action of *assumpsit*, it could not have been supported for want of a consideration; it would have been a *nudum pactum.*" And the second count was sustained expressly on the ground that it was founded on *tort.*

Coggs v. *Bernard* was also an action for the *tort;* though sometimes supposed to be and called *assumpsit.** It was founded, not on the contract to carry safely, but on the *tort*, for negligently staving the cask and spilling the brandy. In 3d Lord *Raym.* 163, we have the record at large. The *narr.* is as pure a declaration in *tort* as could be drawn; the plea is *not guilty*, a bad plea in assumpsit, (*Hardr. Cases* 173) but the proper one in *case* for a *tort;* the verdict is that the defendant "is guilty of the premises laid to his charge." So far then as the case is authority, it is so on our side of the argument; for instead of recovering on his contract because the defendant had begun to execute it, the plaintiff sues for the injury he has sustained by the *tort;* founds his claim not *ex contractu*, but *ex delicto*, and has judgment accordingly. The surprise is, how the questions which were mooted on the motion in arrest of judgment, could have been moved at all; for in such a case and such pleadings, they were not involved, and at this day would not be allowed to be argued. The probability is that the action of *Assumpsit* not having then become very common, the distinction between actions on the case founded on *tort* and on promise, was not fully understood or distinctly marked; and therefore we find much indistinctness and some contradiction in the reasoning and *dicta* of the Judges. *Gould* J. seems to place the plaintiff's right of recovery on the defendant's neglect; that is, on *tort.* *Powys* J. does so expressly. *Powell* J. rests it on "*the warranty;*" and says a warranty needs no considera-

* 1 *Comyn on Cont.* 18.

ration; a position for which he cites no authority, and for which he can find none; and this ground of warranty would extend the defendant's responsibility beyond what it would be were he paid for carrying. Lord *Holt*, though his general dissertation is learned and sound, yet when he comes to the subject of mandates, is inconsistent with himself. In the first part of his argument on this point, he grounds the plaintiff's right of action on *tort*. But in the second part he assumes it as resting on *assumpsit;* and being too stern a common lawyer to raise a contract without a consideration, he says, "the trusting him with the goods is *a sufficient consideration* to oblige him to a careful management;" forgetting that if there be a consideration, it ceases to be a mandate; and that if it ever existed and was not laid in the declaration, the omission is fatal on a motion to arrest the judgment; and also laying down the position that the imposing on the defendant a burden exclusively for the benefit of the plaintiff, is a sufficient consideration to imply a promise on the part of the defendant —a position which even the great name of Lord Holt cannot sustain for a moment—and "to a *careful management;*" that is, to *carry carefully;* though it is admitted by all not to be a sufficient consideration to imply a promise simply to "carry," for if he did not stir a step, no suit would lie. He cites to support him, the Year-book cases, not one of which does support him; and *Riches* vs. *Briggs*,* and *Wheatly* v. *Low*,† the first of which was afterwards reversed; and the latter of which, I shall by and by show not to be law.‡

Coggs v. *Bernard* therefore, as to the point adjudged, is an authority for our doctrine; and as to the *dicta* of the Judges, not to the point adjudged, they must stand for what they are worth.

Mr. Justice *Story* considers the same principle established as it respects gratuitous agencies. See § 172. He cites to support it, no other case than *Wilkinson* v.

* Yelv. 4, Cro. Eliz. 883. † Cro. Jac. 668. ‡ See post. p. 32.

*Coverdale.** In the first place, that is a short *nisi prius* case, of a not very accurate *nisi prius* reporter; which if it ruled precisely the point, is hardly sufficient, without being recognised elsewhere, to establish a new principle of law. But examine the case. Lord *Kenyon's* impression was, that the plaintiff could not recover; but upon the citation of a manuscript case said to have been ruled at *nisi prius*, by *Buller* J., (a very dangerous kind of citation to rely on,) the reporter says, "Lord *Kenyon* acquiesced in the distinction, and suffered the cause to proceed;" but the plaintiff failed in proving the fact of his case, and was nonsuited. Whether Lord Kenyon really changed his opinion on the authority of a manuscript *nisi prius* decision, or suffered the case to proceed, to give time for farther consideration, or to see whether the fact of the case would be proved, which if not, would render any decision unnecessary, may be a matter of speculation; but the case as stated, is a slim authority for any thing. *Kent* C. J., in *Thorne* v. *Deas*, 4 *Johns. Rep.* 100, confines its authority, if any it has, to the case of marine insurance.

Upon the whole, then, I conclude that there is no *contract* formed between the mandator and the mandatory; that though the mandatory is liable for *misfeasance* in the execution of his trust, he is so, not by virtue of his contract, but for his *tort*. If this be so, then is no principle of the common law violated; and yet substantial justice is done. The results of the common law and of the civil law are the same, but they are differently attained.

III.—Deposits.

The principles for which I have contended respecting Mandates, apply in a considerable degree to the subject of Deposits. There certainly can be no contract in the matter of a Deposit, unless you entirely dispense with the

* 1 Esp. Rep. 75.

requisite of consideration; and there is no room here for that "artificial refinement in the distinction between nonfeasance and misfeasance," which is justly said, as there applied, to be "not quite agreeable to the dictates of common sense." The contract which is supposed to subsist is, that the depositary shall keep the thing deposited with a certain degree of care, and return it when the bailor shall require it; and if he fail in either of these particulars, he is liable to an action for the breach of his contract. My doctrine is, that there is nothing of *contract* in the matter, and that though the bailee injure or destroy the deposit by the grossest negligence, or refuse to deliver it to the owner on demand, no action lies for *a breach of contract.* If any will lie, it must be an action of *assumpsit.* Now has there ever been an action of *assumpsit* for an injury to, or non-return of, a deposit from *Bonion's* case, in the 8th of *Edward II.* (*Mayn. Ed. II.* 275,) to the present day? There have been actions enough against depositaries, but never an *assumpsit.* Case, or trespass, for injuries done to the deposit, detinue, trover, replevin, in case of non-delivery of it, are proper actions;—all founded on the plaintiff's right of property, not on the defendant's contract. My view of the subject makes no difference in the obligation of the bailee either as to keeping or returning the deposit, from that of the other writers; but it rests that obligation on a different ground, and remedies violations of it by a different process. The omission to examine this distinction led Sir *William Jones* into a hasty censure of some of the early common-law decisions; and Mr. Justice *Story*, resting on the supposed accuracy of Sir *William Jones* as to what the decisions were, repeats it. He says, § 98, "Although the obligation to restore a deposit seems to flow from the first principles of the contract, as well as from natural justice; yet, strange as it may seem, it was held in the reign of Queen Elizabeth, as Sir William Jones has not scrupled to declare *against common*

sense and common honesty, that *no action would lie* for a non-delivery of the deposit. But this decision was soon afterward overruled, and the present doctrine firmly established."

Such a doctrine as is here attributed to the reign of Elizabeth, would certainly be "against common sense and common honesty;" and the period of its prevalence being that which Chancellor *Kent* justly styles "The Augustan age of the old common-law learning," we are naturally surprised at hearing it. But the object of surprise is changed upon discovering by an examination of the cases, that no such doctrine was either held or overruled. The cases cited to sustain this heavy charge are *Riches* v. *Brigges*,* *Game & ux.* v. *Harvie*,† *Pickas* v. *Guile*,‡ and the case which is lauded as overruling the dishonest doctrine of these cases, is *Wheatley* v. *Low*.§ The error respecting these cases originated with *Lord Holt* in *Coggs* v. *Bernard*, and it is probable Sir *William Jones* followed his *dicta* without examining the cases themselves, and our American professor followed him. But "*nullius addictus*," &c. I oppose the three united—and thus undertaking an Herculean task, I may be allowed to show in detail what the cases really are. *Riches* v. *Briggs*, the reversal of which is the case most "*grumbled at*," was the case of a delivery of twenty quarters of wheat to be delivered by the defendant gratuitously, to a third person; and the defendant promised to do so, but did not, and the plaintiff brought *assumpsit* to recover damages for his not doing it. It is then simply an action against a mandatory for *nonfeasance* of a mandate. The King's Bench gave judgment for the plaintiff, which judgment the Exchequer Chamber reversed. Which was right? Had the plaintiff brought *trover* to recover back the wheat as the defendant did not deliver it, and his right to recover had been denied, the

* Yelv. 4. also reported Cro. Eliz. 883.
† Yelv. 50.
‡ Yelv. 128.
§ Cro. Jac. 668.

reversal had been rightly "grumbled at." But unless we do away the distinction between nonfeasance and misfeasance, which all those writers have so firmly established, we must acknowledge the final judgment undoubtedly right. *Pickas* v. *Guile* would seem to have been more obnoxious to the censure, though that was in the reign of *James*. That was an action by the owner to recover back a deposit. It was *assumpsit*, and the declaration alleged, "that in consideration that the plaintiff, at the request of the defendant, had delivered to him certain cloths he promised upon request, to re-deliver," &c. After verdict, *Yelverton* showed in arrest of judgment, that there is no consideration laid in the declaration to draw a promise from the defendant, for the defendant had no benefit by the cloths, &c. but *nudam custodiam*, which is rather a charge than a benefit, for the defendant could not use them; and therefore it is to be resembled to 9 Ed. 4, where delivery of the evidences to the true owner is no consideration, *for the owner ought to have them of common right. Quod fuit concessum per totam curiam.* And *nil capiat per billam* entered." This is the true ground and the true law. In case of a *deposit*, the plaintiff does not recover back his property on the ground of any contract by the bailee to redeliver; but "*by common right;*" "*en vertu de la loi naturelle;*" by the broad principles of common justice, founded on his right of property. Had the above action been *trover* instead of *assumpsit*, he would undoubtedly have recovered. My right to recover back a deposit is founded on the fact that the defendant has my property in possession, and no right to keep it—a principle of natural justice independent of contract, and acknowledged, even in the matter of bailment in analogous cases, by the civil law,* as fully as by that of England.

* Si j'ai emprunté d'un fou une chose que j'ai reçue de lui, il n'est intervenu par là aucun contrat de prêt, et nous n'avons pas contracté de part ni d'autre les obligations qui naissent du contrat de prêt; si je suis obligé de rendre la chose, ce n'est pas en vertu d'un contrat de prêt, puis qu'il n'en est pas intervenu, mais en vertu de la

Game & ux. v. *Harvie*, was *assumpsit* to recover £30 lent by the wife *dum sola*, to the defendant, and the action was sustained, and the plaintiff had judgment. But it was said by the court, that "If a man delivers to J. S. a bag sealed with money, and the defendant promises to re-deliver it upon request, no *assumpsit* lies upon this," &c. The position extends merely to the form of action; not "that no action would lie." This case and this *dictum* were good law then, and are equally good law now.

Let us now look at the applauded case of *Wheatley* v. *Low*. The plaintiff being indebted to one J. S., delivered to the defendant £10, to be by him delivered to J. S. in part payment of plaintiff's debt. The defendant promised to do so, but did not; and J. S. sued the plaintiff, who then sued the defendant for not delivering the money to J. S. This is not at all the case of a Deposit, as which it was cited; but it is the case of a mandate, and the suit for *non-feasance*. The plaintiff had judgment, and on writ of error, it was affirmed. If the case be correctly reported, is it law? Lord *Holt* relies on it for some of his *dicta* in *Coggs* v. *Bernard;* and in remarking on those *dicta*, (*Ante* p. 27,) I have said this case, as reported, is not law. I think if Lord *Holt* could look at it again, he would agree with me, and I am sure Mr. Justice *Story* will. The plaintiff was entitled to recover back his money, and with interest, in a proper form of action, and on a proper declaration; but he was not entitled to recover damages for the nonfeasance of a mandate, which it was the object of this action, if the report of it be correct, to do. The report is short; and it may have been that there was a count for money had and

loi naturelle, qui oblige tous ceux qui possedent sans cause la chose d'autrui, à la rendre à celui à qui elle appartient: and pareillement, si le fou est obligé de me rembourser les impenses extraordinaires que j'aurois faites pour la conservation de la chose que j'ai reçue de lui, and dont il a profitée, ce n'est pas par un contrat de prêt qu'il y est obligé, n'y en ayant eu aucun, mais par la seule equité naturelle, qui ne permet pas de s'enrichir aux depens d'autrui. Il faut dire la même chose du prêt, qu'une femme sous puissance de mari, &c.—*Pothier Prêt à usage.* n. 13.

received; or one alleging that as the defendant had not paid over the £10 to J. S. he became bound to pay it back to the plaintiff, or something of that nature. At least we would hope so; for if the *gist* of the action was simply to recover damages for the nonfeasance, it was law neither then nor now; and the censure so liberally bestowed on *Riches* v. *Briggs*, should be transferred to *Wheatley* v. *Low*. This review of the cases I think vindicates the reign of Elizabeth from the severe charge brought against it. A depositary could have been compelled to deliver up a deposit by an action of *trover*, or *detinue*, perhaps *replevin*, in the days of *Elizabeth* and *James*, and he can be compelled to do so by the same form of action now; he could not be compelled to do it by an action of *assumpsit* in that "Augustan age of law learning," nor can he be so now.

As to the mode of recovering compensation for injuries done to the deposit while in the possession of the bailee, it is by an action on the *case*, or of *trespass;* both of which are founded on *tort;* and not by an action of *assumpsit*, or any other form of action founded on contract.

Upon the whole then it is not necessary, for the purposes of substantial justice, to break down the well established principle of the common law, that a consideration is essential to a contract, in the matter of deposit, more than in any other case.

The provision of the Common Law requiring a consideration, to raise a contract, is founded in the best practical wisdom. However noble and generous men may be depicted in the pages of Romance, these are but the visions of poets. The law as a governing power, must consider men as they prove themselves to exist; and I have no right to ask its aid, if I have relied upon a promise, made by, perhaps, an entire stranger, to perform services of a delicate and important nature, unless I have paid or promised him a compensation for his labour. Men in the practical concerns of life, deal with each other at arm's length; and

those common law doctrines, which require men to exercise reasonable caution in their dealings with each other, are founded in the truest knowledge of human nature. "The Common Law," says Chancellor Kent,* "affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length, of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information." I have no right to rely on the promises of a stranger, and in those of friends, it is not likely that I shall have occasion to call upon the law for redress.

In a subsequent essay, some remarks will be made upon the diligence required of gratuitous bailees, as affected by the view already taken. At present I conclude with some observations on the subject of *Special Property*.

IV.—Special Property.

There is a doctrine advanced by the *Dane* Professor in relation to several species of bailment, in which he differs from Sir *William Jones*, from *Blackstone*, from Chancellor *Kent*, and from what seems well settled law. He lays down the position that a depositary, mandatory, and borrower, have no kind of property, general or special, absolute or qualified, in the thing bailed; and yet he admits that if they are liable over to the bailor, they may maintain *trover* founded on their possession, and liability over. See §§ 93, 133, 150, 152, 280. *Why* Mr. Justice *Story* should think it necessary to deny the special property, when all preceding commentators, as well as judges without number, had asserted it; and *how* he could deny it, asserting at the same time their right to bring *trover*, it is difficult to see. Even had it been but a change in terms, without a difference in substance, it had better have been avoided. The late case of *Miles* v. *Cottle*, which he cites

* 2 *Comment.* p. 485.

as not quite consistent with his principle, is at variance with and directly contradictory of it: for there the plaintiff had possession of the thing which had been bailed, and was liable over to the absolute owner, but by his conduct had divested himself of the special property which the bailment had at first given him, and therefore could not recover. And had the learned Professor paused a little, he would have recollected that the action of *Trover* is not founded on possession, but on property, and that no man can maintain it unless he have a property, absolute or qualified, in the thing which is the subject of the suit. He must lay it so in his declaration, and he must prove it. It is true that possession may sometimes be sufficient evidence of property, as against a mere wrong-doer; but it is only as evidence that it avails; the right to recover is founded on the property. Whenever the judges speak of it as sufficient, they mean, as evidence of property. "An action of trover," (says Lord *Mansfield*, 1 T. R. 56) "must be founded in the *property* of the plaintiff." "The distinction between the action of trespass and trover," (says Lord *Kenyon*, 4 T. R. 490,) "is well settled; the former is founded on possession, the latter on property." "It is incumbent on the plaintiff, in an action of trover, to prove that he had a property in the chattel," &c. *Bac. Ab. Trover G. Ib. C.* "must allege it in his narr." *Ib. F.* The cases are collected, and the whole doctrine ably set forth by Serjeant *Williams*, in his Note to 2 *Saund.* 47. *a. n.* 1. in which he begins his dissertation with this position. "In order to maintain trover, it is necessary the plaintiff should have either an absolute or special property in the goods which are the subject of the action." And after going through the authorities, he sums up by saying, "However, without such absolute or special property, this action cannot, as we have already noticed, be maintained." It is not to be supposed but that the learned Judge was fully acquainted with the decisions and *dicta* to which I

have referred. But he prefers the civil law doctrine on this subject which recognises no property in such bailees; and he probably thought it would be an improvement of the common law to conform it in this respect to the civil law, and that he was justified in so doing by some *dicta* of C. J. Lee, to which he gives a stronger bearing on the point than they were probably intended to have. In § 93, after examining some authorities which countenance the position of a special property in all bailees, he adds, "But the doctrine generally maintained by the better authorities is that a depositary has no property whatsoever in the deposit, but a custody only. It was so adjudged upon very full consideration by the court in *Hartop* v. *Hoare*,* where the point was directly in judgment; and Southcote's case, (4 Co. 83, 84) was relied on as supporting it." The case of *Hartop* v. *Hoare* was thus: *Hartop*, the owner of certain jewels, enclosed them in a paper which he sealed, and put in a box, which he also sealed with his seal, and deposited them with *Seamer*, a jeweller and banker, merely for safe keeping. Some time after, *Seamer* broke the seals, took out the jewels, and pledged them to *Hoare*, who kept a public open shop in *London*, and traded in jewels, as a security for £300 then borrowed from him, and afterwards became bankrupt. *Hartop* brought *trover* against *Hoare* for the jewels. The question was, *Hartop's* right of recovery. The *point* of the case was, whether this pledging was not equivalent to a sale; if so, being in market-overt, it would have devested the plaintiff's property. In delivering the opinion of the court, *Lee* C. J. does go into an inquiry of the relation in which *Seamer* stood to *Hartop* and the effect of his acts on *Hartop*, in which he necessarily examines the nature of his interest in the jewels. But that was not the "point directly in judgment," nor one about which there was any dispute or difficulty. For certainly as against *Hartop*, *Seamer* had no property in the

* 3 Atk. 44.

jewels, to prevent a recovery against him if he had refused to deliver them upon demand; and as he could give *Hoare* no greater interest than he had himself, except on the principle of a sale in market-overt, *Hoare* could have none. I consider the Chief Justice as confining his remarks to a consideration of the nature of *Seamer's* property *as against Hartop;* and as it stood at the time he pledged the jewels to *Hoare.* He says, "*Seamer* had no kind of property either general or special; he came to the possession of the jewels by right originally; but when he broke the seal and took the jewels out of the bag, and by that means enabled himself to deliver them openly to the defendants, he was possessor *malæ fidei*, and went to the defendants as such." From this one might infer that he admitted the principle in general, that as respects the third person, a depositary had a special property; as otherwise there is no pertinency in his resting the want of it on the circumstances of his breaking the seals and taking the jewels out of their envelopes, and thereby devesting himself of the special property he originally had, and in fact ceasing to be a bailee. This view of the case makes it coincide precisely with the principle laid down in *Miles* v. *Cottle.* If C. J. *Lee* meant to go as far as Mr. Justice *Story* supposes, he was not supported by previous authorities, and has been overruled by later ones. The case is also reported, but more shortly, in *Strange* (*vol.* 2, *p.* 1187,) and not a word said by him as to the property that *Hoare* had as depositary, in the jewels; showing that *Strange* considered the point in judgment to be, not that of what property the bailee had, but whether the doctrine of a market-overt extended to the case of a pawn.

In § 133, Mr. Justice *Story* repeats his position that a depositary has no property in the deposit, and cites three Massachusetts cases* as decided on that ground. The correctness of those decisions may perhaps be doubted; and

* 9 Mass. R. 104. Ib. 265. 14 Mass. R. 217

the contrary to them has been, as we are told by Mr. Justice Story, decided upon full consideration, in New Hampshire. But whether they be right or wrong, I do not consider them as deciding that the bailee has no property in a deposit. The court does not, in those cases, consider the plaintiff as the bailee of the goods; they consider him merely as the *servant* of the deputy-sheriff, (and he is also so called in Bridge v. Wyman,)* and that the special property is vested in such deputy. The question therefore, of a bailee's property, did not arise. The first two of these cases seem to be more hostile to the principle Mr. Justice Story would substitute as the ground of recovery by such a bailee; viz. possession and liability over: for the plaintiffs had possession of the goods, and had given engagements to the deputy to restore them, whereby they were liable to him, and yet they failed to recover. This new principle as a ground of action, viz. possession and liability over, Mr. Justice Story thinks is countenanced by the case of *Rooth* v. *Wilson*.† That was "case against the defendant for not repairing the fences of a close adjoining that of the plaintiff, whereby a certain horse *of plaintiff*, &c. fell, &c. and was killed." "Defence, that the plaintiff had not such a property in the horse, as to entitle him to maintain this action." The point of the case then was, the plaintiff's property in the horse; and the judgment being in his favour decides he had a property in him. It is true that Lord *Ellenborough*, in delivering his opinion, is reported to say, "such liability is sufficient to enable the plaintiff to maintain this action;" but from his adding immediately following, "he has an interest in the integrity and safety of the animal, and may sue for a damage done to that interest," he seems to place the right of recovery on the *property* or "interest," and perhaps considered his liability over, as affording a rule by which to estimate the amount of damages: otherwise, 1st. There is no pertinency in his

* 14 Mass. R. 195. † 1 B. & A. 59.

concluding remark; 2d. He could not have given judgment for the plaintiff on the declaration which alleged his property; 3d. If not, it would be placing the plaintiff's right of recovery on his own misfeasance. For the liability over to the absolute owner of the horse, was because of his negligence: had he taken due care, and yet the accident happened, he had not been liable over. Now to say that because a man is negligent, and thereby gives a cause of action against himself to A, he shall *on that account*, have a cause of action against B., seems strange. 4th. *Bayley* J., who immediately follows Lord *Ellenborough*, says, "I am entirely of the same opinion," and yet places the right of recovery on the property, and says, if it had been an indictment for larceny, it might have been described as the horse of the plaintiff. 5th. But farther, Is mere liability, without being sued or in any way damnified, a ground of action *per se*, and when there is no covenant to indemnify against it? But even if Lord Ellenborough said what he is reported to say, and means what Mr. Justice Story supposes him to mean, it was but an *obiter dictum*, and, unsupported by the other judges, can hardly overturn a well settled ground of action, and substitute a new one in its stead.

On the whole, I cannot perceive that Mr. Justice Story has sufficient authority for denying that depositaries, mandatories, and borrowers, have a special property in the thing bailed.

These remarks have been extended much beyond what was originally intended. In a subsequent number, the subject will be farther examined in relation to other points.

Erratum.

Page 10, in the 12th line from the bottom, for *consideration* read *compensation*.